Del. Op. Atty. Gen. 00-IB15, 2000 WL 1920102 (Del.A.G.)

Office of the Attorney General
State of Delaware
Opinion No. 00-IB15

October 4, 2000

RE: Delaware State Housing Authority Application Procedures

The Honorable David P. Sokola
24 Beech Hill Drive
Newark, DE 19711
The Honorable Roger P. Roy
3 Citation Court
Wilmington, DE 19808

Dear Senator Sokola and Representative Roy:

On August 1, 2000 Representative Roy requested a legal opinion from the Department of Justice concerning the Delaware State Housing Authority's decision to deny access to a project market study for the Cynwyd Club apartments. On August 4, 2000 Senator Sokola submitted a similar request to the Department of Justice. In each of your letters, you also noted that the Delaware State Housing Authority ("DSHA") took action on the various applications for the project and you questioned whether such action was valid if the market studies were not public and should have been.

On or about August 10, 2000, DSHA, after review, made the market study for the Cynwyd apartment project available to both of you without restriction. Subsequently, on September 25, 2000, DSHA notified both of you that, in future applications for housing credits, "the market study submitted as part of the application will be made available to the public, upon request, once all of the applications are submitted." While that decision moots the first question you posed, your discussion on this subject with our office has placed the question of public accessability in a broader context, namely, the extent to which all documents submitted by an applicant are publicly accessible.

The starting point for such an analysis is 29 Del. C. § 10002(d) which defines public record as:

> information of any kind, owned, made, used, retained, received, produced, composed, drafted or otherwise complied or collected by any public body, relating in any way to public business, or in any way of public interest, or in any way related to public purposes, regardless of the physical form or characteristic by which such information is stored, recorded or reproduced.Clearly, the application, and any documentation submitted by an applicant in support of the application, falls within the definition of a public record. However, Section 10002(d) provides fourteen exceptions to the definition of public documents including subsection (2) which states that "[T]rade secrets and commercial or financial information obtained from a person which is of a privileged or confidential nature" shall not be deemed public. One of the significant concerns for DSHA is the fact that the funding cycle is a several step process that takes the better part of a year from start to finish. The applicants are required to submit significant amounts of financial information not only about the applicant itself but the cost formulas that will be used to determine the cost of the project and the amount of money or tax credit sought from the DSHA. In circumstances where there is more than one applicant for a particular project, the process can be quite competitive and certain aspects of the information submitted in the application, if made public prior to the final approval of the grant, could result in the disclosure of commercial or financial information which is privileged or confidential.

Under Delaware law, a trade secret is "confidential and proprietary information" which, if it "falls into a rival's hands", will cause "serious competitive disadvantage." ID Biomedical Corp. v. TM Technologies, Inc., Del. Supr., 1994 WL 384605, at p. 4 (July 20, 1994). "Faced with objections based on trade secret or proprietary information, courts have applied tests that look first to whether the information sought is indeed a trade secret and whether disclosure of such information will be harmful to the objecting party." MacLane Gas Co. v. Enserch Corp., Del. Ch., 1989 WL 104931, at p. 2 (Sept. 11, 1989) (Chandler, V.C.). The fact that two or more entities may be in competition for a tax credit does not necessarily cloak their submission with the protection afforded by this section of FOIA. Stated another way, it is the information, not the process which is subject to the FOIA exception.

In Opinion 77-029 (Sept. 27, 1977), this Office

relied on cases under the federal FOIA trade secrets exception, which "uses language nearly identical to Delaware's Sunshine Law." Id. Commercial or financial information "'is confidential' for purposes of the exemption if disclosure of the information is likely to have either of the following effects: (1) to impair the Government's ability to obtain necessary information in the future; or (2) to cause substantial harm to the competitive position of the person from whom the information was obtained.'" Id. (quoting National Parks & Conservation Ass'n v. Morton, 498 F.2d 765, 770 (D.C. Cir. 1974) (footnote omitted). See also United Technologies Corp. v. Department of Health & Human Services, 574 F. Supp. 86, 89 (D. Del. 1983).

Trade secrets "consist of any formula, pattern, device or compilation of information which is used in one's business, and which gives an individual or business an opportunity to obtain an advantage over competitors who do not know or use it. It may be a formula for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers.'" Opinion 77-029 (Sept. 27, 1977) (quoting Restatement of Torts Section 757, comment b). The factors in determining whether information is a trade secret are: (1) the extent to which the information is known outside the business; (2) the extent to which it is known by employees and others involved in the business; (3) the extent of measures taken to guard the secrecy of the information; (4) the value of the information to the business and its competitors; (5) the amount of effort or money expended developing the information: and (6) the ease or difficulty with which the information could properly be acquired or duplicated by others. Opinion 77-029 (citing Space Aero Products, Inc. v. R.E. Darling Co., Md. App., 208 A.2d 74 (1965)).

In Opinion 87-IO31 (Nov. 4, 1987), this Office determined that personal financial statements filed by licensees with the Alcoholic Beverage Control Commission contained confidential information and were not disclosable under FOIA. The exemption for confidential financial information was intended "'broadly to protect individuals from a wide range of embarrassing disclosures.'" Id. (quoting Gregory v. FDIC, 470 F. Supp. 1329, 1334 (D.D.C. 1979), rev'd in part on other grounds, 631 F.2d 896 (D.C.Cir. 1980)). "The release of information regarding one's assets, profits and losses, stock holdings, loans and collateral" are confidential financial information. Opinion 87-IO31.

The trade secrets exception comes up often in public contracts, when a losing bidder asks to see the proposal submitted by the winning bidder, as well as documents evidencing how the agency decided to award the contract. As a general rule, responses to a government agency's request for proposal "are public records subject to the provisions of the Freedom of Information Act." Computer Co. v. Division of Health & Social Services, Del. Ch., 1989 WL 108427, at p. 3 (Sept. 19, 1989) (Hartnett, V.C.). See Opinion 77-037 (Dec. 28, 1977) (bid packages are information "received by a public body" and therefore subject to FOIA, unless they contain trade secrets or confidential or privileged information, in which case they may be redacted).

In Hecht v. Agency for International Development, C.A. No. 95-263-SLR (D. Del., Dec. 8, 1996), federal contractors argued that information they submitted to the federal government was exempt from disclosure as trade secrets. The contractors sought to prevent disclosure of employee resumes, claiming that would open the door to recruitment by competitors. The federal district court found that "[t]he possibility of another company recruiting away one's employees is present in nearly every industry, ... [and] [t]he possibility that contractors would suffer substantial harm in this manner resulting from the disclosure of their employees' biographical data appears remote." Slip. op. at 19. The contractors also sought to prevent disclosure of indirect cost rates (fringe benefits, overhead, and general and administrative costs). Although the unit prices charged to the government were not exempt from disclosure, the district court concluded that disclosure of the contractor's profit multiplier could result in an unfair competitive advantage, by enabling competing contractors "'to accurately calculate [the contractor's] future bids and its pricing structure ....'" Slip op. at 22 (quoting Gulf & Western Industries, Inc. v. United States, 615 F.2d 527, 530 (D.C. Cir. 1979)). The district court also held that information in bid proposals regarding the contractor's technical approaches need not be disclosed, because it contained details about the contractors' processes, operations, and style of work.

Accordingly, DSHA must, similar to other state agencies, work from the premise that any application and supporting documentation is presumed open to the public unless it falls within one of the Section 10002(d) exceptions of being deemed a "trade secret" or of being characterized as information of a "privileged or confidential nature." If an applicant marks a document as confidential or trade secret, the agency is not bound by that claim but is required to make its own independent determination whether the document in fact meets the statutory test of being a trade secret or confidential financial information.

The second issue raised by your inquiry was whether the failure to produce the market study invalidated any action taken by the Council on Housing (the "Council") with respect to the

applications. Traditionally, the only relief when there is a denial of access to public documents is a finding by our office or a ruling by an appropriate court that the agency will be required to make public a document previously withheld from public access. The only cure for a denial of access is the availability of access.

Actions taken by a public body in a public meeting are subject to the provisions of 29 Del. C. § 10004 relating to open meetings. The purpose of § 10004 is to assure that the business of the public body is conducted in the open and that the public be fairly informed in advance of the subject(s) to be considered at the meeting. In the context of actions taken by the Council on the Cynwyd apartment project, there is no allegation nor basis to conclude that any of the provisions of Section 10004 were violated. Accordingly, it is our conclusion that the Council's action in conducting its consideration and action on the application through July 31, 2000 were in conformity with Section 10004 and not subject to any remedial action under 29 Del. C. § 10005.

Please feel free to contact me if you have any further questions.

Very truly yours,
Michael J. Rich
State Solicitor

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